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Attorneys for Defendant/Counter-Plaintiff,  
 KEATING DENTAL ARTS, INC.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL  
 CERAMICS, INC. dba GLIDEWELL  
 LABORATORIES,

Plaintiff,

v.

KEATING DENTAL ARTS, INC.

Defendant.

AND RELATED COUNTERCLAIMS.

Civil Action No.  
 SACV11-01309-DOC(ANx)

Honorable David O. Carter

**DEFENDANT AND  
 COUNTER-PLAINTIFF  
 KEATING DENTAL ARTS,  
 INC.'S NOTICE OF MOTION  
 AND MOTION IN LIMINE  
 TO EXCLUDE TESTIMONY  
 OF DR. RONALD  
 GOLDSTEIN (MOTION IN  
 LIMINE NO. 2)**

Trial Date: February 26, 2013

Time: 8:30 a.m.

Location: Courtroom 9D

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on February 26, 2013, at 8:30 a.m., or as  
 3 soon thereafter as the matter may be heard by the Honorable David O. Carter of the  
 4 United States District Court for the Central District of California, Southern  
 5 Division, at 411 West Fourth Street, Courtroom 9D, Santa Ana, CA, 92701,  
 6 Defendant and Counter-Plaintiff Keating Dental Arts, Inc. ("Keating" or  
 7 "Defendant") will move and hereby does move for an order excluding from trial all  
 8 testimony, reports, and declarations from Plaintiff and Counter-Defendant James R.  
 9 Glidewell Dental Ceramics, Inc.'s ("Glidewell") expert witness Dr. Ronald  
 10 Goldstein ("Goldstein"). Goldstein's Expert Report and Supplemental Declaration  
 11 were untimely and should be excluded pursuant to Federal Rule of Civil Procedure  
 12 37(c)(1).

13 This motion is based upon this Notice, the accompanying Memorandum of  
 14 Points and Authorities, all pleadings, papers, and records on file in this action, all  
 15 matters of which the Court may take judicial notice, and such further written and  
 16 oral argument as may be presented to the Court.

17 Respectfully submitted,

18 KNOBBE, MARTENS, OLSON & BEAR, LLP

19 Dated: January 17, 2013

20 By: /s/ David G. Jankowski

21 Darrell L. Olson

22 Lynda J. Zadra-Symes

23 Jeffrey L. Van Hoosear

24 David G. Jankowski

25 ENTERPRISE COUNSEL GROUP ALC

26 David A. Robinson

27 James S. Azadian

28 Attorneys for Defendant and Counter-Plaintiff  
 KEATING DENTAL ARTS, INC.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Defendant and Counter-Plaintiff Keating Dental Arts, Inc. (“Keating” or “Defendant”) hereby moves for an order *in limine* to exclude from trial any testimony from Plaintiff and Counter-Defendant James R. Glidewell Dental Ceramics, Inc.’s (“Glidewell”) expert witness Dr. Ronald Goldstein (“Goldstein”), and any argument relating thereto. Goldstein was not timely named as an expert during discovery. The Goldstein Expert Report, Declaration, and Supplemental Declaration<sup>1</sup> were untimely and presented after the deadlines for exchanging opening expert reports and rebuttal expert reports and after the Court-ordered deadline for commencing depositions. Accordingly, any evidence or argument relating to, or introduced by, the Goldstein Expert Report, Declaration, and Supplemental Declaration should be excluded from trial pursuant to Federal Rule of Civil Procedure (“F.R.C.P.”) 37(c)(1).

### **II. RELEVANT BACKGROUND**

As stated in the Rule 26(f) Joint Report filed with the Court (Docket No. 11), the date for exchange of opening expert reports was September 15, 2012 and the date for exchange of rebuttal expert reports was October 15, 2012. As stated in the Court’s Scheduling Order (Docket No. 15), discovery cut-off was set for October 29, 2012, with all depositions scheduled to commence by at least October 22, 2012.

On or about September 15, 2012, the parties exchanged their expert reports. The only expert report Glidewell submitted by the September 15, 2012 deadline was the expert report of Davis J. Franklyn (Docket No. 125-12), which is the subject of Keating’s motion *in limine* no. 1. Glidewell did not submit any rebuttal expert reports by the October 15, 2012 deadline.

However, on the discovery cut-off date, October 29, 2012, shortly before midnight, Glidewell served Goldstein’s Expert Report (“Goldstein Expert Report”).

<sup>1</sup> Goldstein’s Supplemental Declaration is essentially a rebuttal report.

1 (Docket No. 125-15.) Thus, the Goldstein Expert Report was untimely served six  
2 weeks after the deadline for exchange of opening expert reports, two weeks after  
3 the deadline for exchange of rebuttal expert reports, and after the Court-ordered  
4 date for commencing depositions. (Docket Nos. 11 & 15.) This was the first date  
5 Glidewell disclosed Goldstein as an expert witness.

6 Incidentally, also on October 29, 2012, Glidewell filed an *Ex Parte*  
7 Application to Amend Scheduling Order to extend discovery deadlines. (Docket  
8 No. 69.) However, the Court denied Glidewell's *Ex Parte* Application on  
9 November 9, 2012 and refused to extend the discovery or expert disclosure  
10 deadlines. (Docket No. 74.)

11 On November 19, 2012, Glidewell filed Goldstein's Declaration in Support  
12 of Glidewell's Motions for Summary Judgment ("Goldstein Declaration"). (Docket  
13 No. 90, Ex. O.) The Goldstein Declaration is virtually identical to the untimely  
14 Goldstein Expert Report. Five weeks after the October 15, 2012 deadline to  
15 exchange rebuttal expert reports, the Goldstein Declaration improperly attempts to  
16 rebut the timely expert reports of Dr. Eggleston.

17 On November 26, 2012, Glidewell filed a Supplemental Appendix of  
18 Evidence in Support of its Oppositions to Keating's Motions for Summary  
19 Judgment (Docket No. 116), containing Goldstein's Supplemental Declaration  
20 ("Goldstein Supplemental Declaration"). (*Id.*, Ex. X.). The Goldstein  
21 Supplemental Declaration improperly attempts to rebut the timely expert reports of  
22 Keating's dental industry expert, Dr. David Eggleston, six weeks after the October  
23 15, 2012 deadline to exchange rebuttal expert reports had passed.

24 **III. GOLDSTEIN'S EXPERT TESTIMONY IS UNTIMELY AND**  
25 **SHOULD BE EXCLUDED PURSUANT TO F.R.C.P. 37(C)(1)**

26 Under F.R.C.P. 26(a)(2) (A), a party must disclose to the other parties the  
27 identity of any expert witness it may use at trial. A party's expert witness  
28 disclosure must be accompanied by a written report prepared by the expert witness

1 containing, among other things, all the opinions the witness will express at trial and  
2 the basis for those opinions. F.R.C.P. 26(a)(2)(B). Moreover, these disclosures  
3 must be made at the time, and in the sequence, that the court orders.  
4 F.R.C.P. 26(a)(2)(D). “If a party fails to provide information or identify a witness  
5 as required by Rule 26(a) or (e), the party is not allowed to use that information or  
6 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure  
7 was substantially justified or is harmless.” F.R.C.P. 37(c)(1).

8 Here, Glidewell violated F.R.C.P. 26(a)(2) by failing to provide (1) the  
9 Goldstein Expert Report and Goldstein Declaration by the September 15, 2012  
10 deadline for exchanging opening expert reports, and (2) the Goldstein  
11 Supplemental Declaration (essentially a rebuttal report in response to the expert  
12 reports of Dr. David Eggleston) by the October 15, 2012 deadline for exchanging  
13 rebuttal expert reports. The Goldstein Expert Report, Declaration, and  
14 Supplemental Declaration introduced evidence that was not disclosed during  
15 discovery.

16 Moreover, due to the untimely nature of Goldstein’s submissions, Keating  
17 never had the opportunity to depose Goldstein and question him regarding his  
18 Expert Report, Declaration, and Supplemental Declaration. Thus, pursuant to  
19 F.R.C.P. 37(c)(1), the evidence introduced in these submissions must be excluded  
20 from trial unless Glidewell can show a “substantial justification” for its violation of  
21 F.R.C.P. 26(a)(2), or show that its violation was harmless. *Yeti by Molly Ltd. v.*  
22 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

23 Admitting evidence past the discovery dates is a disfavored practice, and the  
24 burden rests entirely on Glidewell to establish that it was substantially justified in  
25 failing to timely serve the Goldstein Expert Report, Declaration, and Supplemental  
26 Declaration, or that the failure to timely serve was harmless. *See Wong v. Regents*  
27 *of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (holding that proponent  
28 could not establish that the failure to produce expert reports in a timely manner was

1 not harmless where deadlines for disclosing experts and conducting expert  
2 discovery had passed, and the court would have had to reopen discovery and extend  
3 the period for submitting rebuttal reports); *see also Jarritos, Inc. v. Reyes*, 345 Fed.  
4 Appx. 215, 217 (9th Cir. 2009) (holding that the district court properly excluded  
5 expert witness reports that were produced after the discovery deadline, even though  
6 the reports were central to the party's case and its exclusion was highly prejudicial  
7 to proponent).

8 Glidewell has not offered any proper justification for its failure to timely  
9 provide the Goldstein Expert Report, Declaration, and Supplemental Declaration.  
10 Glidewell never brought to Keating's attention that it intended to serve such reports,  
11 nor provided any extenuating circumstances justifying a need to delay the filing of  
12 the Goldstein Expert Report, Declaration, and Supplemental Declaration.

13 The only explanation given by Glidewell in its *Ex Parte* Application (which  
14 the court denied) was that Glidewell's prior counsel had not been diligent. (Docket  
15 No. 69, page 1.) Lack of diligence, however, is not a proper excuse for ignoring the  
16 Court's scheduling orders. *Wong*, 410 F.3d at 1062. Furthermore, given that the  
17 Goldstein Expert Report, Declaration, and Supplemental Declaration were  
18 submitted long after the deadline for exchanging expert reports, the prejudice to  
19 Keating increased significantly because Keating did not have the opportunity to  
20 depose Goldstein. In light of this increased prejudice, the burden on Glidewell of  
21 showing a "substantial justification" should be further increased.

22 It is also well settled that serving expert reports after the case cut-off dates is  
23 considered not harmless. *E.g., Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963,  
24 969 & n. 5 (9th Cir. 2006) (affirming trial court's refusal to consider an expert  
25 report because plaintiff had failed to comply with the trial court's Scheduling  
26 Order); *Jarritos*, 345 F. Appx at 217 ("The district court acted within its discretion  
27 in excluding Jarritos' late-filed expert reports."). In order for Glidewell's untimely  
28 reports to be admitted, the Court would have to reopen discovery and extend expert

1 disclosure deadlines. The court expressly denied Glidewell's request for such  
2 extensions. *See Wong*, 410 F.3d at 1062. Additionally, and significantly, Keating  
3 made its decisions regarding its own experts and defense strategy based on what  
4 Glidewell had provided before the cut-offs. Accordingly, Glidewell has not met its  
5 high burden to justify the admission of any evidence or argument relating to, or  
6 introduced by, the untimely Goldstein Expert Report, Declaration, and  
7 Supplemental Declaration. The belated information should be excluded at trial  
8 pursuant to F.R.C.P. 37(c)(1).

#### 9 IV. CONCLUSION

10 For the foregoing reasons, the Court should exclude from trial all testimony,  
11 reports, and declarations by Dr. Ronald Goldstein, and any argument relating  
12 thereto.

13 Respectfully submitted,

14 KNOBBE, MARTENS, OLSON & BEAR, LLP

15 Dated: January 17, 2013

16 By: /s/ David G. Jankowski

17 Darrell L. Olson

18 Lynda J. Zadra-Symes

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